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Supreme Court, U.S.
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No. 03-274

IN THE
SUPREME COURT OF THE UNITED STATES

DUANE LYNN,
PETITIONER,

-vs-

HON. PETER C. REINSTEIN, JUDGE OF THE SUPERIOR COURT OF THE STATE OF ARIZONA, IN AND FOR THE COUNTY OF MARICOPA,
RESPONDENT.

and

RICHARD GLASSEL; STATE OF ARIZONA
REAL PARTIES IN INTEREST.

ON PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

BRIEF IN SUPPORT OF THE PETITION

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1 APP

QUESTION PRESENTED FOR REVIEW

Does the Eighth amendment erect a *per se* bar against States permitting crime victims to offer an opinion on the appropriate sentence in capital cases?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

REASON WHY THIS COURT SHOULD GRANT THE WRIT .. 3

A. *Booth* and *Payne* have set the standards governing the admissibility of victims' opinion testimony at a capital sentencing. 3

B. After *Booth* and *Payne*, the overwhelming majority of courts that have considered the issue have concluded that the opinion of any individual or group regarding whether a sentence of death should be imposed is irrelevant in a capital sentencing proceeding. 4

C. The State Agrees with Petitioner-Victim that there exists a split among the lower courts on the issue presented in the petition. . 7

D. There is no sound basis to distinguish between capital and non-capital cases, and the courts are in universal agreement that victims should have the right to make sentencing recommendations in non-capital cases. 7

CONCLUSION 11

TABLE OF AUTHORITIES

CASES — PAGE

Adams v. State,
951 S.W.2d 722 (Mo. App.,1997) 9

Booth v. Maryland,
482 U.S. 496 (1987) 1, 3-5, 7, 9, 10

Burns v. State,
609 So.2d 600 (Fla., 1992) 5

Fryer v. State,
68 S.W.3d 628 (Tex. Crim. App., 2002) 9

Greene v. State,
37 S.W.3d 579 (Ark., 2001) 5

Hooper v. Mullin,
314 F.3d 1162 (10th Cir., 2002) 7

Ingoglia v. State,
651 A.2d 409 (Md. App.,1995) 9

Livingston v. State,
444 S.E.2d 748 (Ga., 1994) 5

Murphy v. State,
47 P.3d 876 (Okla. Crim. App., 2002) 7

Payne v. Tennessee,
501 U.S. 808 (1991) 1, 4-7, 10

Robison v. Maynard,
829 F.2d 1501 (10th Cir. 1992) 4, 5

Romano v. Gibson,
239 F.3d 1156 (10th Cir. 2001) 4

State v. Bjorklund,
604 N.W.2d 169 (Neb., 2000) 5

State v. Johnson,
463 N.W.2d 352 (Wis. App.,1990) 8, 9

State v. Koskovich,
776 A.2d 144 (N.J., 2001) 5

State v. Lindahl,
56 P.3d 589 (Wash. App. Div. 2, 2002) 9

State v. Mail,
854 P.2d 1042, 1046 (1993) 9

State v. Ross,
696 P.2d 706 (Ariz. App.,1984) 9

State v. Treesh,
739 N.E.2d 749 (Ohio, 2001) 5

State v. Tyler,
565 S.E.2d 368 (W.Va.,2002) 9

State v. Whitten,
667 A.2d 849 (Me.,1995) 9

Taylor v. State,
666 So.2d 36 (Ala.Crim.App., 1994) 6

Turrentine v. State,
965 P.2d 955 (Okla. Crim. App., 1997) 7

Whitehead v. State,
777 So.2d 781 (Ala.Crim.App., 1999) 5

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII 2-5, 7

STATUTES

Ind.Code Ann. § 35-38-1-9 (Burns 1985) 7

Alaska Stat. § 12.55.022 (1984) 7

Ariz.Rev.Stat.Ann. § 12-253.4 (Supp.1984-1985) 7

Ark.Stat.Ann. § 75-2502(c) (Supp.1983) 7

Cal.Penal Code § 1203(h) (West Supp.1985) 7

Conn.Gen.Stat.Ann. § 54-91c (West Supp. Pamphlet 1962 to 1983) 7

Fla.Stat.Ann. § 911.143 (West Supp.1985) 7

Iowa Code Ann. § 901.3 (West Supp.1984-1985) 7

Kan.Stat.Ann. § 21- 4604(2) (Supp.1984) 7

La.Code Crim.Proc.Ann. art. 875.B (West 1984) 7

Mass.Ann.Laws ch. 279, § 4B (Michie/Law. Co-op.Supp.1985) .. 8

Md. Ann. Code art. 41, § 124 (1957, 1984 Cum. Supp.) 8

Me.Rev.Stat.Ann. tit. 17-A, § 1257.2 (Supp.1984-1985) 8

Minn.Stat.Ann. § 609.115 1b(b) (West Supp.1985) 8

Mont.Code Ann. § 46-18-112 (1984) 8

N.J.Stat.Ann. § 2C:44-6.b (West Supp.1984-1985) 8

N.Y.Crim.Proc.Law § 390.30 (McKinney 1983) 8

Neb.Rev.Stat. § 29- 2261 (Cum.Supp.1984) 8

Nev.Rev.Stat. § 176.145 3 (1981) 8

Ohio Rev.Code Ann. § 2947.051 (Page Supp.1984) 8

Okla.Stat.Ann. tit. 22, § 982 (West Supp.1984-1985) 8

Or.Rev.Stat. § 144.790(2), (4) (1983) 8

R.I.Gen.Laws § 12-28- 3(10) (Supp.1984) 8

S.C.Code Ann. § 16-3-1550 (Law.Co-op.1985) 8

Tenn.Code Ann. § 40-35-207(8) (1982) 8

Va.Code § 19.2-299.1 (Supp.1984) 8

Vt.Stat.Ann. tit. 13, § 7006 (Supp.1984) 8

W.Va.Code §§ 61-11A- 1 to -7 (1984) 8

Wis.Stat.Ann. § 950.04(2m) (West Supp.1984-1985) 8

RULES

Fed.R.Crim.P. 32(c)(2)(C) 8

OTHER AUTHORITIES

10 U.L.A. 78 (Special Pamphlet 1985) 8

President's Task Force on Victims of Crime 18, 33-34 (Final Report Dec.1982) 8

Unif. Model Sentencing and Corrections Act § 3-204(9) 8

STATEMENT OF THE CASE

Prior to trial, Petitioner, who is one of the surviving victims in the criminal case tried below, filed a motion to allow the presentation of his opinion at the penalty phase of the capital proceeding regarding what should be the appropriate sentence. The capital Defendant did not object because it was the defense belief that the victim would opine that the death penalty was not appropriate. The defense position was that a victim's life recommendation was allowable but a victim's death recommendation was not.[1] The State's position was that under this Court's interpretation of *Booth v. Maryland*, 482 U.S. 496 (1987) and *Payne v. Tennessee*, 501 U.S. 808 (1991) the victim's opinion regarding what is the appropriate sentence in a capital sentencing proceeding is irrelevant and should not be admitted regardless of whether it was in favor of or opposed to the death sentence. The trial court agreed with the State's position and held that "no capital sentencing recommendation of a victim, be it life or death, is admissible at any phase of these proceedings absent further order of this Court." (Appendix to the Petition at 24.) Petitioner-victim filed a special action challenging this ruling with the Arizona Court of Appeals.

The Court of Appeals accepted jurisdiction of the special action, but denied relief. The court found that under this Court's precedent that the victim's opinion regarding the appropriate sentence was not admissible,

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[1] The State and Defendant understood that the Petitioner-victim changed his mind when the special action was pending in the Arizona Court of Appeals and would actually opine that the appropriate penalty should be a death sentence. Now and in the Arizona Supreme Court, Petitioner-victim asserts that a life sentence was the sentence recommendation he would have made.

and affirmed the trial court's decision. (Appendix to the Petition at 17-18.) The jury imposed the death penalty without hearing a sentence recommendation from the victims of the crime.

Petitioner-victim sought review of the Court of Appeal's ruling with the Arizona Supreme Court. The Arizona Supreme Court granted review and affirmed the lower court ruling. The Arizona Supreme Court felt bound by this Court's Eighth Amendment jurisprudence regarding whether a victim could make a sentencing recommendation in a capital case. (Appendix to the Petition at 11-12.) This Petition for Certiorari followed.

REASON WHY THIS COURT SHOULD GRANT THE WRIT

Before addressing this Court's Eighth Amendment precedent regarding whether opinion testimony is admissible at a capital sentencing, the State wishes to reiterate the position it has maintained throughout the proceedings below. The State believes that sound public policy considerations mandate that victims have the right to be heard concerning what they believe is the appropriate sentence in a criminal matter—capital or non-capital. However, below the State felt duty bound to argue that Arizona courts should follow the overwhelming body of law finding that victim sentencing recommendations are barred in capital cases. This duty was to preserve the validity of the capital sentence being sought in this case, and those that the State would seek in the future.

However, the State believes that this Court should reconsider its position in this area of the law.

A. *Booth* and *Payne* have set the standards governing the admissibility of victims' opinion testimony at a capital sentencing.

In 1987, this Court held that "the introduction of a [victim-impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment." *Booth v. Maryland,* 482 U.S. at 509. In *Booth*, the Court concluded that such information "is irrelevant to a capital sentencing decision, and . . . its admission creates a constitutionally unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner." 482 U.S. at 502–03. The victim-impact testimony at issue in *Booth* concerned descriptions of the victims, the emotional impact of the crimes on the family, and "the

family members' opinions and characterizations of the crimes and the defendant." 482 U.S. at 502.

In *Payne*, this Court overruled its decision in *Booth*, holding that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar." *Payne v. Tennessee*, 501 U.S. at 827. The *Payne* court explicitly cautioned, however:

> *Booth* also held that the admission of a victim's family members' characterizations and opinions about the crime, the defendant, *and the appropriate sentence* violates the Eighth Amendment. No evidence of the latter sort was presented at the trial in this case.

501 U.S. at 830 n. 2 (emphasis added).

B. After *Booth* and *Payne*, the overwhelming majority of courts that have considered the issue have concluded that the opinion of any individual or group regarding whether a sentence of death should be imposed is irrelevant in a capital sentencing proceeding.

The Tenth Circuit Court of appeals was one of the first courts to address the issue presented in this petition. In *Robison v. Maynard*, 829 F.2d 1501 (10th Cir. 1992), *overruled in part, on other grounds, by Romano v. Gibson*, 239 F.3d 1156, 1169 (10th Cir. 2001), the Tenth Circuit Court interpreted and applied this Court's precedent and came to the same conclusion reached by the Arizona Supreme Court below. The *Robison* court rejected the capital defendant's claim that a due process violation occurred because the trial court refused to allow him to present testimony from family members of the victims opining that they did not believe that the death penalty should be given to the

defendant. The defense contended this testimony would present proper evidence for the jurors to consider. The trial court granted the State's motion to exclude such evidence on the ground that allowing the testimony "would be no more proper" than allowing the State to put on testimony that the death penalty should be given. 829 F. 2d at 1503; *Robison v. Maynard*, 943 F.2d 1216, 1217 (10th Cir. 1991) (affirming *Robison* after *Payne*).

Other courts that have addressed this issue have come to the same conclusion. *See e.g. Greene v. State*, 37 S.W.3d 579, 583-86 (Ark., 2001) (opinion of a victim's family member as to the appropriate punishment is not relevant evidence); *State v. Koskovich*, 776 A.2d 144, 177 (N.J., 2001) (prohibition concerning the appropriate penalty is "intended to apply to testimony either in support of, or in opposition to, the death penalty."); *State v. Treesh*, 739 N.E.2d 749, 776-77 (Ohio, 2001) (reaffirming that after *Payne* "the admission of witnesses' opinions as to the appropriateness of a particular sentence" is prohibited); *State v. Bjorklund*, 604 N.W.2d 169, 214–15 (Neb., 2000) (victims' recommendation about the appropriate sentence violates the Eighth Amendment); *Whitehead v. State*, 777 So.2d 781, 846-47 (Ala.Crim.App., 1999) (family of the victim went beyond evidence deemed admissible by expressing their opinions on what they thought the appropriate sentence should be for defendant); *Livingston v. State*, 444 S.E.2d 748, 750 n.2 (Ga., 1994) (*Payne* did not overrule *Booth's* prohibition that a victim may not opine about the appropriate sentence); *Burns v. State*, 609 So.2d 600, 605 (Fla., 1992) (same).

Petitioner-victim asserts that it is unfair to limit a victim's opinion regarding sentence because there is not a corresponding limitation to non-victim witnesses offered by the defense. The Petitioner-victim is wrong as the prohibition of offering an opinion concerning the appropriate punishment has not been limited to victims. For example, the Alabama appellate courts have upheld the trial court's

denial of a capital defendant's attempt to include opinion testimony from non-victims regarding whether the death penalty should be imposed. In *Taylor v. State*, 666 So.2d 36 (Ala.Crim.App., 1994), the trial court refused to allow testimony from the defendant's family and friends requesting that the jury spare the appellant's life. The trial court sustained the objection of the prosecutor and refused to allow such evidence, because to do so "invades the province of the jury."

> It is the holding of this Court that the opinion of the friends or relatives of the defendant that the defendant should not be sentenced to death is not a relevant mitigating circumstance for the jury to consider at the penalty phase of a capital case.

Taylor v. State, 666 So.2d at 50-53; *aff'd. sub nom.*, *Taylor v. State*, 666 So.2d 73 (Ala. 1995).

After reviewing all of the cases cited above, it is clear that under *Payne* and *Booth,* in a capital sentencing proceeding evidence or testimony relating to the opinions, personal beliefs or feelings of any witness or expert about whether a defendant should or should not receive the death penalty is not admissible. This is true whether the evidence is submitted directly through a specific opinion or request that defendant not be sentenced to death, or indirectly, by defendant's family, friends or loved ones explaining how the loss of the defendant would impact them.

C. The State Agrees with Petitioner-Victim that there exists a split among the lower courts on the issue presented in the petition.

Petitioner-victim is correct that the Oklahoma Court of Criminal Appeals has interpreted *Booth* and *Payne* and determined that crime victims are not precluded under the Eighth Amendment from offering an opinion regarding the appropriate sentence in a capital case. *Murphy v. State*, 47 P.3d 876, 885 (Okla. Crim. App., 2002); *Turrentine v. State*, 965 P.2d 955, 980 (Okla. Crim. App., 1997); *but cf. Hooper v. Mullin*, 314 F.3d 1162, 1174 (10th Cir., 2002) (finding that the Oklahoma Criminal Court did not follow clearly established precedent from this Court.) Because the State believes that this Court should overrule the dicta in *Payne* that has prevented crime victims from making sentencing recommendations in capital cases, the State likewise requests that the Court take the case to resolve the disagreement.

D. There is no sound basis to distinguish between capital and non-capital cases, and the courts are in universal agreement that victims should have the right to make sentencing recommendations in non-capital cases.

Many jurisdictions authorize the use of a victim impact statement or similar form of victim input in the sentencing process. *See e.g.* Alaska Stat. § 12.55.022 (1984); Ariz.Rev.Stat.Ann. § 12-253.4 (Supp.1984-1985); Ark.Stat.Ann. § 75-2502(c) (Supp.1983); Cal.Penal Code § 1203(h) (West Supp.1985); Conn.Gen.Stat.Ann. § 54-91c (West Supp. Pamphlet 1962 to 1983); Fla.Stat.Ann. § 911.143 (West Supp.1985); Ind.Code Ann. § 35-38-1-9 (Burns 1985); Iowa Code Ann. § 901.3 (West Supp.1984-1985); Kan.Stat.Ann. § 21- 4604(2) (Supp.1984); La.Code Crim.Proc.Ann. art. 875.B (West 1984);

Me.Rev.Stat.Ann. tit. 17-A, § 1257.2 (Supp.1984-1985); Md. Ann. Code (1957, 1984 Cum.Supp.), art. 41, § 124; Mass.Ann.Laws ch. 279, § 4B (Michie/Law. Co-op.Supp.1985); Minn.Stat.Ann. § 609.115 1b(b) (West Supp.1985); Mont.Code Ann. § 46-18-112 (1984); Neb.Rev.Stat. § 29- 2261 (Cum.Supp.1984); Nev.Rev.Stat. § 176.145 3 (1981); N.J.Stat.Ann. § 2C:44-6.b (West Supp.1984-1985); N.Y.Crim.Proc.Law § 390.30 (McKinney 1983); Ohio Rev.Code Ann. § 2947.051 (Page Supp.1984); Okla.Stat.Ann. tit. 22, § 982 (West Supp.1984-1985); Or.Rev.Stat. § 144.790(2), (4) (1983); R.I.Gen.Laws § 12-28- 3(10) (Supp.1984); S.C.Code Ann. § 16-3-1550 (Law.Co-op.1985); Tenn.Code Ann. § 40-35-207(8) (1982); Vt.Stat.Ann. tit. 13, § 7006 (Supp.1984); Va.Code § 19.2-299.1 (Supp.1984); W.Va.Code §§ 61-11A- 1 to -7 (1984); Wis.Stat.Ann. § 950.04(2m) (West Supp.1984-1985); Fed.R.Crim.P. 32(c)(2)(C). *See generally* Unif. Model Sentencing and Corrections Act § 3-204(9), 10 U.L.A. 78 (Special Pamphlet 1985) (recommending that presentence report include any statement relating to sentencing submitted by the victim of the offense or the investigative agency); *President's Task Force on Victims of Crime* 18, 33-34 (Final Report Dec.1982) (recommending that federal and state governments require victim impact statements at sentencing). Once enacted, state courts have regularly found that a victim's recommendation concerning the sentence to be imposed is not only permissible, but desirable.

As noted by the court in *State v. Johnson,* 463 N.W.2d 352, 356 (Wis. App.,1990):

> We believe that consideration of the comments--even the "wishes"--of a victim is within the sentencing court's prerogatives. Courts are entitled--even encouraged--to consider the rights and interests of the public in imposing a sentence in a particular case. . . . Indeed, we held in *Jones* that consideration of the victim's

> "rehabilitative needs" was a "logical extension" of the universally accepted practice of considering the rights and interests of the public in sentencing offenders.

See also, Ingoglia v. State, 651 A.2d 409, 414 (Md. App.,1995) (agreeing with *Johnson*); *State v. Ross*, 696 P.2d 706, 709 (Ariz. App.,1984) (trial court properly considered victim's recommendation for probation.); *Fryer v. State*, 68 S.W.3d 628, 630 (Tex. Crim. App., 2002) (victims may give sentence recommendation in non-capital sentencing, refusing to apply *Booth*); *State v. Whitten,* 667 A.2d 849, 852-53 (Me.,1995) (court may consider victims sentence recommendation, but not mandated to follow it.): *State v. Tyler*, 565 S.E.2d 368, 378 (W.Va.,2002) (same); *Adams v. State* 951 S.W.2d 722, 725 (Mo. App.,1997) ("the trial court retains its broad discretion to receive any information from any source it deems relevant to the sentencing process, including recommendations as to the appropriate sentence to be imposed").

In *State v. Lindahl* 56 P.3d 589, 596 (Wash. App. Div. 2, 2002) the court noted that Washington statutes allow victims or the survivors of victims, or their representatives, to submit victim impact statements to the court and to personally present a statement at a felony sentencing hearing. In addition, the statutes provide that during a sentencing hearing, the court "shall consider ... any victim impact statement ... and allow arguments from the prosecutor, the defense counsel, the offender, the victim, the survivor of the victim, or a representative of the victim or survivor, and an investigating law enforcement officer as to the sentence to be imposed." In interpreting the statute, the Washington Supreme Court has observed that the statute provides "'a baseline a minimum amount of information which, if available and offered, *must* be considered in sentencing.'" (quoting *State v. Mail,* 854 P.2d 1042, 1046 (1993)).

If in the non-capital arena it is a "baseline" or "minimum" that the victim be allowed to opine about the sentence they wish to see imposed, it is baffling to the State that in the capital arena the victim has to be muzzled. If such evidence is "irrelevant" in the capital context, why is it so relevant in the non-capital context? The State can see no logical reason to draw a line in the manner that the courts have drawn it based on *Payne* and *Booth*. The State believes that victims should be able to opine regarding the sentence they wish to see imposed based on the loss of their loved ones. The State respectfully requests that the Court grant certiorari and clarify that the dicta in *Payne* and *Booth* did not erect a *per se* bar to victims opining about the appropriate sentence in a capital case.

CONCLUSION

Based on the foregoing authorities and arguments, Respondent respectfully requests this Court to grant the petition for writ of certiorari.

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